IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6363 OF 2006

M/s. The Nasik Peoples
Co-operative Bank Ltd., .. Petitioner.

vs.

Rajan Bhalchandra Datar
& Ors. .. Respondents.

Mr. H.S. Venegavkar for petitioner.
Mr. Y.S. Jahagirdar, Sr. Counsel with Vaibhav Joglekar & Lucky Raj Indorkar i/by M/s. Shaunak Satpute & Co. for Respondents.

CORAM : A.P. DESHPANDE, J.

DATE : 21st November, 2006.

P.C.

. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of the parties.

2. The petitioner co-operative bank filed a dispute in the Co-operative Court against the respondents for recovery of a sum of Rs. 3 crores and odd. The amount involved being more than Rs. 10 lacs, the proceedings were stayed in view of the

order passed by the High Court in Shamrao Vithhal Co-operative Bank's case. As the petitioner bank was keen in early recovery of the amount it thought it appropriate to move an application before the Co-operative Court under Order 23 of the CPC with a view to withdraw the dispute and initiate proceedings under Section 101 of the Co-operative Societies Act for obtaining a certificate for recovery of the amount. It is not in dispute that the co-operative court had not passed any order on the application moved by the petitioner filed under Order 23 Rule 1 of CPC. Perusal of the application seeking withdrawal of the dispute makes it clear that the bank wanted to withdraw the dispute with liberty to file proceeding under Section 101 for obtaining certificate for recovery of the amount of dues. It is also relevant to note that the respondents herein had objected to the grant of leave for instituting the proceedings under Section 101 of the Co-operative Societies Act. The Co-operative Court could have either granted leave prayed for for instituting proceedings under section 101 or could have rejected the application. It had done nothing in the matter and no order was passed. Though the Co-operative Court had not passed any order on the application, either granting leave or refusing the same under section 23 (1), the petitioner filed an application before the Co-operative Court under Section 101 with a view to

obtain a certificate of recovery. By the time the petitioner approached the Assistant Registrar by moving an application under Section 101, another judgment of this Court in the case of Rekha Shridhar vs. Janata Bank was delivered taking a contrary view to the one taken in Shamrao Vithhal's case holding that even claims above Rs. 10 lacs can be tried by the Co-operative Court. In view of the change in the legal position the present petitioner withdrew the application moved under Section 101 from the file of the Assistant Registrar and which was permitted by the Assistant Registrar and thus, the petitioner moved another application before the Co-operative Court seeking to withdraw its earlier application filed under Order 23 Rule (1) seeking to withdraw the dispute. The Co-operative Court had permitted the petitioner bank to withdraw the application which it had filed under Order 23 Rule (1) obviously in view of the fact that no orders were passed by the Co-operative Court on the said application till the petitioner bank moved an application seeking to withdraw the same. The order passed by the Co-operative Court was very much legal and proper.

3. The respondent moved an application for review of that order which was rejected by the trial Court and aggrieved by the orders passed by the trial Court, the respondents carried an appeal

before the Co-operative Appellate Court. The Appellate Court has partly allowed the appeal and quashed and set aside the orders passed by the Co-operative Court and granted liberty to the respondent to file a fresh application before the Co-operative Court seeking dismissal of the dispute as withdrawn and directed the trial Court to adjudicate the issue whether merely by filing an application seeking withdrawal the same is deemed to have been allowed or otherwise.

4. Perusal of the order passed by the First Appellate Court reveals that the appellate court is labouring under a misconception that the moment an application under Order 23 is filed, the same results in automatic withdrawal of the dispute. It further appears that as the appellate court was labouring under some confusion in regard to the legal position, he thought it fit to send the matter back to the trial Court for a de novo decision on the issue. When an application is moved under Order 23, Rule (1) seeking leave of the Court to institute some other proceedings, there cannot be any withdrawal by a deeming fiction or what is termed as ’automatic’ by the first Appellate Court. There has to be an order passed by the Court and if no order is passed, it shall be open for the party moving the said application to withdraw the same. The order passed by the Co-operative Appellate Court suffers

from patent illegality and thus interference of this Court under Article 227 jurisdiction is called for. The view taken by the Co-operative Appellate Court also results in miscarriage of justice. Hence, the writ petition has to be allowed. I allow the same by quashing and setting aside the order passed by the Maharashtra State Co-operative Appellate Court, Mumbai dated 4,8,2006 and confirm the order passed by the trial Court permitting withdrawal of the application moved by the Bank under Order 23 Rule (1) of CPC.

5. Rule is made absolute in the above terms. No order as to costs.

(A.P. Deshpande, J.)